No. 80-1400

In the

Supreme Court of the United States

OCTOBER TERM, 1980

CITIES SERVICE OIL COMPANY,

Petitioner,

vs.

TIRE SALES CORPORATION, GEORGE NORDSTROM and EDWARD LAUGHLIN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT W. BERGSTROM
BERGSTROM, DAVIS & TEEPLE
39 South LaSalle Street
Suite 800
Chicago, Illinois 60603
(312) 641-1420
Attorneys for Respondents.

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

OPINION BELOW 1

STATEMENT OF THE CASE 2

ARGUMENT AS TO WHY THE WRIT SHOULD BE DENIED:

INTRODUCTION 11

I.

BECAUSE THE OPINION IS INTERLOCUTORY IN NATURE, THE WRIT SHOULD BE DENIED 11

II.

THE COURT OF APPEALS CORRECTLY RULED THAT THERE WAS AMPLE EVIDENCE TO GO TO THE JURY REGARDING COERCION AND AS TO THE COUNTERCLAIM 11

III.

CITGO DELIBERATELY MISREADS THE COURT OF APPEAL'S DECISION IN ORDER TO ADVANCE THE SPURIOUS CHARGE THAT IT WILL CHILL COMPETITION 15

IV.

CITGO'S PETITION SHOULD BE DENIED BECAUSE IT WRONGFULLY SEEKS TO HAVE THIS COURT REVIEW THE SUFFICIENCY OF PLAINTIFF'S EVIDENCE AMPLY ESTABLISHING THE ELEMENTS OF ILLEGAL TIE-IN SALES 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

PAGE

Albrecht v. Herald Co., 390 U.S. 148, 149 (1968) 13

Atlantic Refining Co. v. F.T.C., 381 U.S. 357 (1965) ..2, 17

Belliston v. Texaco, 455 F.2d 175 (10 Cir. 1972) *cert. denied,* 408 U.S. 928 (1972) 16

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) 11

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 696 (1962) 12

Davis v. Marathon Oil, 528 F.2d 395, 400 (6th Cir. 1975) *cert. denied,* 429 U.S. 823 (1976) 14

Detroit City Dairy v. Kowalski Sausage Co., 393 F. Supp. 453 (E.D. Mich. 1975) 20

Fortner Enterprises v. U.S. Steel Corp., 394 U.S. 495, 502-503 (1969) 20

F.T.C. v. Texaco, Inc., 393 U.S. 223 (1968) 2, 15, 20

Graver Manufacturing Co. v. Linde Co., 336 U.S. 271, 275 (1949) 18

Hamilton Shoe Co. v. Wolf Brothers, 240 U.S. 251, 258 (1916) 11

Kelly v. Kosuga, 358 U.S. 516 (1976) 14

Milsen Co. v. Southland Corp., 454 F.2d 363, 368 (7 Cir. 1971) 14

Moore v. Jas. B. Matthews & Co., 550 F.2d 1207, 1217 (9th Cir. 1977) 13, 16, 20, 21

Osborn v. Sinclair Refining Co., 286 F.2d 832, 838 (4th Cir. 1969) 16

Phillips v. Crown Central Petroleum Corp., 602 F.2d 616, 628 (4th Cir. 1979) .....' 20

PAGE

Richfield Oil Corporation v. Karseal Corp., 271 F.2d 709, 712 (9th Cir. 1959) 16

Ryan v. Napier, 252 F. Supp. 730, 733 (N.D. Ill. 1966) 14

Shell Oil Co. v. F.T.C., 360 F.2d 470 (5th Cir. 1966) *cert. denied.*, 385 U.S. 1002 (1967) 2

Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) 18

Transnational Insurance Co. v. Rosenlund, 261 F. Supp. 12, 21 (D. Ore. 1966) 14

United States v. Johnston, 268 U.S. 220, 227 (1925) 18

United States v. Loew's Inc., 371 U.S. 38 (1962) 19, 20

United States v. Sun Oil Company, 176 F. Supp. 715 (E.D. Pa. 1959) 16

U.S. v. Real Estate Board, 339 U.S. 485, 489 (1968) 13

Yentsch v. Texaco, 630 F.2d 46 (2nd Cir. 1980) 21

STATUTES

15 U.S.C. §1 (§1 of the Sherman Act) 3, 12, 16, 17

15 U.S.C. §14 (§3 of the Clayton Act) 3, 12, 16, 17

15 U.S.C. §45 (§5 of the Federal Trade Commission Act) 2, 15, 17

TEXTS

Antitrust Developments, 1955-1968 (ABA), pp. 106-108 19

Stern and Gressman, *Supreme Court Practice*, Fifth Edition (1978), pp. 271, 272 18

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Tire Sales Corporation, George Nordstrom and Edward Laughlin respectfully request that this Court deny the petition for writ of certiorari, seeking review of an opinion rendered and judgment entered on October 7, 1980 by the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at ..... F. 2d ....., CCH 1980-81 Trade Cases, ¶63,683. The opinion is interlocutory in nature; it remands the case for trial on plaintiff Tire Sales Corporation's antitrust

claims against defendant Cities Service Oil Company ("Citgo") of conspiracy to restrain trade, tie-in sales, group boycott, and exclusive dealing, and for trial on Citgo's collection counterclaim. The Court of Appeals reversed the District Court for the Northern District of Illinois, which had directed a verdict against plaintiff at the close of its case and had granted summary judgment against respondents on the counterclaim.

STATEMENT OF THE CASE

This is an antitrust suit brought by a former Uniroyal franchisee, in business since 1952. In 1965 Citgo and Uniroyal requested that plaintiff Tire Sales sell Uniroyal tire, batteries and accessories (TBA) to some 50 independent, Chicago area Citgo dealers. At that time, Citgo and Uniroyal had a sales-commission arrangement under which Citgo received a "commission" from Uniroyal on sales of Uniroyal TBA to Citgo's independent dealers. After such arrangements were found by the Federal Trade Commission, by various courts of appeal, and by this Court* to be unfair methods of competition in violation of §5 of the Federal Trade Commission Act, 15 U.S.C. §45, Citgo and Uniroyal replaced the sales-commission arrangement with a purchase-resale arrangement, and Tire Sales was required to purchase from Citgo the TBA which plaintiff sold to independent Citgo dealers. Under this purchase-resale arrangement Citgo continued to receive a "cut" on TBA sales to its in-

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* *Atlantic Refining Co.* v. *F.T.C.*, 381 U.S. 357 (1965); *F.T.C.* v. *Texaco, Inc.*, 393 U.S. 223 (1968); and *Shell Oil Co.* v. *F.T.C.*, 360 F. 2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

dependent dealers, but in the form of a mark-up rather than a commission".*

At the end of 1970 Citgo terminated its purchase-resale arrangement with Uniroyal and replaced Tire Sales with Berry Tire, a Goodyear franchisee, as its TBA supplier to these same stations. Plaintiff's sales of TBA to these stations dropped precipitously and plaintiff thereafter went out of business. Plaintiff contends that this occurred because Citgo coerced its dealers into ceasing to purchase TBA from plaintiff and into purchasing from Berry Tire instead.

Plaintiff complains that Citgo's actions constitute a conspiracy to restrain trade, group boycott, tying arrangement, and exclusive dealing in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 3 of the Clayton Act, 15 U.S.C. §14.

In ruling on cross motions for summary judgment, District Judge John F. Grady found that plaintiff was entitled to a trial on these charges:

> "According to depositions of several present and former Citgo dealers, Cities Service engaged in more than mere salesmanship. For example, dealers testified that if they failed to buy from Berry, they were threatened with cancellation of their leases, and one dealer testified that Cities Service refused to make needed repairs of the station premises." (Appendix

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* Actually, insofar as Citgo was concerned, this was a false paper transaction without substance, because plaintiff continued to use its warehouse for storage of the items and to receive shipments directly from Uniroyal, and plaintiff had to keep a supply of Citgo invoices so that Citgo could appear as the purported middleman on any shipments which plaintiff took from Uniroyal and warehoused for resale to Citgo service station dealers.

to Citgo's petition, p. 21a)

. . . .

"The plaintiff has produced evidence that the defendant coerced its dealers into buying TBA from Berry. Such coercion included threats to cancel service station leases and refusal to perform repairs. If the defendant proves these allegations at trial, a tie-in would clearly be established." (Appendix to Citgo's petition, p. 23a)

At the subsequent trial before District Judge Frank J. McGarr, plaintiff produced as witnesses many of these same former Citgo dealers on whose depositions Judge Grady had relied in finding evidence of coercion, but Judge McGarr held that there was insufficient evidence to establish a *prima facie* case of coercion and directed a verdict against plaintiff at the close of its case.

The Court of Appeals in reviewing the record found that there was sufficient evidence of coercion to entitle plaintiff to a jury decision, and also reversed the District Court (Judge Grady) in granting summary judgment to Citgo for TBA sold to plaintiff, which plaintiff contended it could not in turn resell to Citgo dealers because of Citgo's coercion of these dealers into ceasing to buy from plaintiff.

Among the evidence of coercion presented by plaintiff at trial, some of which is discussed in the Court of Appeal's opinion, is the following.

In March of 1971 a so-called "TBA Fair" was held at the premises of Berry Tire in Blue Island, Illinois, attended by representatives of Citgo and Berry. Citgo's dealers were requested to attend, and Citgo dealers who had been customers of Tire Sales were introduced to

Berry Tire. (294-95, 205-8.)* Citgo in a report on this "fair" stated, "This distributor replaced Tire Sales on the south side of Chicago," (A46-47.) Citgo's counsel, in referring to this exhibit at trial, stated, "Of course we replaced them." (182).

After Citgo replaced Tire Sales with Berry Tire, Citgo's salesmen sold TBA from Berry Tire Company to the dealers and Cities Service salesmen were assigned quotas for sales from Berry to Citgo dealers, for which Berry offered defendant's salesmen rewards in the form of trips. (A48-50, 52.)

Former independent Citgo service station dealer Loren Critchett testified that the following conversations with the Citgo sales representatives took place:

> "He said that Berry Tire would be supplying Cities Service or Citgo dealers with these certain products and that's who we would be buying from now." (63)
> "They asked me why I wasn't buying from Berry Tire." (66)
> "I do remember very vividly being shown a ledger sheet with a written record of TBA purchases from every dealer that was associated with Jim Scolli, every dealer that he called on was all written down, the name, the date of the purchases and how much they purchased from Berry Tire, and there was my name on there with a very trivial amount." (66)
> "The essence of it was that I was not operating my business in the same manner as the majority of the other Citgo dealers, because they were all buying things from Berry Tire and I wasn't and it was more or less hinted that if I didn't operate the same

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* References such as "(R1)" are to the record; references such as "(A1)" are to the Appendix to plaintiff's brief in the Court of Appeals; and references such as "(1369)" are to the trial transcript.

way as the other dealers, then I wouldn't be a dealer any more." (70)

"It was vividly drilled through my head that maintenance and upkeep on the station was directly related to sales. In other words, you get your sales up and we make improvements." (74)

"It was a constant matter of conversation, it was a matter of buying things from Berry Tire Sales having a direct relation to the operation of the business and also as to just how long I was going to stay in there."* (81)

Zenon Raczkowski, Critchett's employee who succeeded him as lessee-operator of the station, was told by his Citgo dealer sales representative:

"He said I was not buying enough TBA from my suppliers to make my business there profitable to the oil company and that they would, if I continued to buy these small portions like I was buying, it wouldn't be profitable for them to keep the place open, that they would change it, that they'd throw me out." (248)**

Defense counsel, cross-examining former independent Citgo service station dealer William Hafer, received the following answers:

"Q. Now, after you were introduced to Berry, you started buying TBA from Berry, correct?

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* Citgo in its petition misrepresents this testimony as showing that only one "threat" was made against Critchett.

** Citgo attempts to discount the repeated threats to Raczkowski by arguing that he did not give in to them. But the evidence shows that after he was told that he would be thrown out and they would turn the station into a grocery operation, he left the year after his lease was renewed, because of the uncertainty that this might happen. (248, 235-6.)

A. Yes, sir.
Q. And that was your own individual choice, correct?
A. With a little coercion.
Q. I'm sorry?
A. With a little coercion." (456.)

The dealer then, in answers to defense counsel, testified:

> "I know that I really didn't want to leave Tire Sales." . . . . "I am sure there did [other conversations take place], because I didn't want to leave Tire Sales, I'm sure there was other conversations."

He recalled the sales representative saying:

> "that this is our new program, Bill, and you are expected to go along with it, and things along that line. . . ." (479-80)*

Former Citgo dealer Morris Kulovitz testified to the following conversation with Citgo's dealer sales representative:

> "Yes, Mr. Clay came in with a salesman from Berry Tire and he introduced me to him and told me that they were not doing business with Tire Sales anymore and that I should buy my merchandise from Berry Tire as of that day on." (140)

He thereafter stopped buying tires from plaintiff. (144)

Former dealer Albert Kulbitsky testified that his Citgo sales representative:

> "informed me that we would be dealing through Berry Tire instead of Tire Sales. . . . I asked him why and he just said we're dealing with Berry Tire from now on." (205, 207).

He thereafter stopped buying tires from plaintiff. (207-11)

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* Citgo in its petition refuses to acknowledge that a jury could reasonably conclude that statements such as this are threats.

Coercion and causation of injury are also shown by the statements by dealers to the Tire Sales representative that the decreases in their purchases from Tire Sales were because "Berry Tire was now the authorized supply point" for Cities Service, made by dealers Perry, Pappalardo, Kulbitsky, Cerny, Hafer, Franklin, Vallow, Novak, Strom, and Asbridge (A89-92.)*

After Citgo instructed its dealers that they should deal with Berry and not with Tire Sales, Tire Sale's TBA sales to Citgo dealers began to dwindle to a small fraction of their former volume. (546)

The sales and profits of Tire Sales from 1968 to 1975 (Evergreen Park location, the location from which it sold to Citgo dealers) are as follows:

	Total Sales (includes sales to all customers, not just Citgo dealers)	Net Profit (Loss)	
1968	$422,379.96	$ 5,679.01	
1969	480,229.80	16,500.00**	
1970	460,047.62	(13,118.17)	
1971	313,542.99	(12,596.04)	
1972	218,400.10	(31,633.97)	
1973	241,642.97	(37,178.18)	
1974	167,927.98	(31,613.65)	
1975	117,328.69	(33,925.74)	(Pl. Ex. 25A)

* Citgo's argument that there was no evidence that the dealers were economically dependent on Citgo is shown to be hollow by Citgo's own petition. The footnote at page 5 of Citgo's petition shows that even the District Judge who directed a verdict for Citgo noted that all of the dealers "felt vulnerable, as well they might, having leases and depending upon Citgo for their gas supply."

** A financial statement relied on by defendant dated 1970 but changed in part to 1969 gives the net profit figure as $10,411.89.

After Citgo instructed the independent Citgo dealers to shift from plaintiff to Berry Tire, plaintiffs' sales to its former Citgo station customers diminished as follows:

1970	$232,022
1971	140,760
1972	72,064
1973	84,790
1974	51,859
1975	22,300

(1116-7, Ex. 25A)

As the sales of Tire Sales decreased after Citgo replaced it with Berry Tire, Berry's sales to the stations which had been customers of plaintiff were as follows:

1971	$114,674.37	
1972	192,281.89	
1973	153,499.81	
1974	148,368.70	
11/12 of 1975	96,011.17	(Ex. 51, A116.)

The best proof of plaintiff's financial condition and its anticipated continuing growth and success, had the boycott not been initiated, comes from Citgo's own files. When Citgo was considering making a loan to plaintiff, in 1971 its own memorandum (A30-45) recited that "our credit experience has always been excellent with payments always received within document terms. . . . The balance has never been past due." "They formed this business in 1952 and have operated successfully over the past 18 years." "From both a sales and credit viewpoint, our relationship with Tire Sales has been good."

When Citgo "replaced" Tire Sales, Tire Sales owed from $70,000 to $80,000 to Citgo for TBA which included Citgo batteries. "When we didn't have any place to sell it anymore, there just wasn't anything we could do with

it." Tire Sales attempted to return this TBA but without success. It was able to sell some of this TBA at retail but much of it was obsolete. (1096.)

Plaintiff made payments reducing this balance to approximately $40,000, and defendant's Credit Manager stated to Mr. Nordstrom of plaintiff as follows:

> ". . . he told me that he realized the reason we were in the financial predicament we were in was Citgo's fault and he was not going to push me on this payment of this particular indebtedness. . . ." (1098; 1100.)

It is this balance which is the subject of Citgo's counterclaim.

ARGUMENT AS TO WHY THE WRIT SHOULD BE DENIED

INTRODUCTION

Citgo has totally failed to show any "special and important reasons", as required by Rule 17 of this Court, as to why its petition should be granted. The interlocutory opinion of the Court of Appeals for the Seventh Circuit is not in conflict with any decision of this Court or of another federal court of appeals on the same matter nor does it decide a federal question in a way in conflict with applicable decisions of this Court.

I.

BECAUSE THE OPINION IS INTERLOCUTORY IN NATURE, THE WRIT SHOULD BE DENIED.

As noted above, the subject opinion is interlocutory in nature. It remands this case for trial on the complaint and counterclaim. For this reason, the writ should be denied. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 258 (1916).

II.

THE COURT OF APPEALS CORRECTLY RULED THAT THERE WAS AMPLE EVIDENCE TO GO TO THE JURY REGARDING COERCION AND AS TO THE COUNTERCLAIM.

The Court of Appeals correctly decided (1) that the District Court erred in directing a verdict against plaintiff on its various antitrust claims, and (2) that the

District Court erred in granting summary judgment to Citgo on its counterclaim.

Applying the applicable standard set by this Court, that in considering a motion for a directed verdict, both the trial court and the reviewing court are "bound to view the evidence in the light most favorable to [plaintiff] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn" (*Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 696 (1962)) the Court of Appeals properly concluded after reviewing the evidence (as had District Judge Grady in deciding cross motions for summary judgment) that "reasonable persons in a fair and impartial exercise of judgment might . . . decide that Citgo, the profit-taking middleman, exercised its economic power and coerced its dealers to terminate their TBA business with plaintiff in favor of their new distributor Berry Tire in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act."

Citgo's answer to this is to contend that each of the individual coerced dealers presents a separate individual lawsuit claim, and if one of them did not account for many sales, his testimony as to coercion does not create an individual cause of action of substance. This attempt to "divide and conquer" by separating off each piece of evidence as if it were a separate case is not in accordance with either common sense or the established law. In *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, *supra*, this Court held that the lower court had been incorrect in separating Continental's claims as if they were five separate lawsuits. This Court said (370 U.S. 699):

> "We think this was improper. In cases such as this plaintiffs should be given the full benefit of

> their proof without totally compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States* v. *Patten*, 226 U.S. 525, 544 . . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures involved.' *American Tobacco Co.* v. *United States*, 147 F.2d 93, 106 (C.A. 6th Cir.)."

This hornbook antitrust proposition was followed in *Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207, 1217 (9th Cir. 1977):

> "The fact that each purchaser of a cemetery lot was not absolutely required to buy a marker is an argument we rejected in Siegel, supra. [*Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971)]. There we refused to accept appellant's individual coercion theory and we were not troubled by the fact there was no evidence to show that each of the 650 franchisees had been required to purchase the equipment, mixes, and packaging. A showing of an onerous effect on an appreciable number of buyers coupled with a demonstration of sufficient economic power in the tying market is sufficient to demonstrate coercion."

While as discussed in the foregoing Statement of the Case, there was evidence of numerous threats against dealers by Citgo, the Court of Appeal's decision is also in line with this Court's rulings that the use of subtle means short of threats or sanctions to achieve restraints of trade can constitute violations of §1 of the Sherman Act. *Albrecht* v. *Herald Co.*, 390 U.S. 148, 149 (1968). As this Court said in *U.S.* v. *Real Estate Board*, 339 U.S. 485, 489 (1949):

> "And the fact that no penalties are imposed for deviations from the price schedules is not material. [Citing cases.] Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line."

Davis v. *Marathon Oil,* 528 F.2d 395, 400 (6th Cir. 1975), *cert. denied,* 429 U.S. 823 (1976), cited by Citgo, is not on point because there the plaintiff was a single Marathon dealer, not a TBA supplier, who "testified that he purchased TBA from whomever he wanted."

As to the collection counterclaim, the Court of Appeals correctly decided that it was "premature to grant summary judgment . . . until plaintiff's antitrust allegations are finally resolved after a full trial" and that this case was distinguishable from *Kelly* v. *Kosuga,* 358 U.S. 516 (1959) because "if proved, defendant's antitrust violations did prevent plaintiff from reselling these goods. . . ."

This is not a case of a separable contract but a case where defendant violated the implied contractual duty which exists in all contracts not to obstruct or undermine the purposes contemplated by the contract. *Ryan* v. *Napier,* 252 F. Supp. 730, 733 (N.D. Ill. 1966); *Transnational Insurance Co.* v. *Rosenlund,* 261 F. Supp. 12, 21 (D. Ore. 1966). Defendant's argument before the Court of Appeals, that it did not prevent performance by this conduct because the only performance that plaintiff had to do was to pay for the products even if defendant by criminal actions prevented plaintiff from reselling them and obtaining the money to pay for them, is manifestly sophistry. As the Court said in *Milsen Co.* v. *Southland Corp.,* 454 F.2d 363, 368 (7 Cir. 1971), "if a court allows defendant to collect . . . , it must in effect approve the possible antitrust violations."

III.

CITGO DELIBERATELY MISREADS THE COURT OF APPEAL'S DECISION IN ORDER TO ADVANCE THE SPURIOUS CHARGE THAT IT WILL CHILL COMPETITION.

Citgo in its petition (p. 13) advances the spurious charge that the Court of Appeal's decision "prohibits a 'dominant' franchisor from selling any goods not covered by the franchise agreement to the 'dependent' dealer." Citgo advanced this same argument before the Court of Appeals in its petition for rehearing and suggestion for rehearing *en banc* ("no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing." Appendix to Citgo's petition at p. 46a).

The Court of Appeals correctly defined the central fact issue in this case as follows: "whether Citgo dealers ceased doing business with plaintiff because they concluded on their own or through legitimate salesmanship efforts by Citgo that plaintiff's products were no longer preferable to those offered by competitors or because **Citgo used its economic power to coerce them into doing so.**" (Emphasis added.) Thus, it is clear that the Court has not barred Citgo from directing legitimate salesmenship efforts for TBA to its independent dealers.

Contrary to Citgo's contention, the Court of Appeals did not rely solely on cases decided under Section 5 of the FTC Act, although this Court's ruling in *F.T.C.* v. *Texaco*, 393 U.S. 223, 228-29 (1968) was clearly correct in stating:

> "A service station dealer whose very livelihood depends upon the continuing good favor of a major oil company is constantly aware of the oil company's

> desire that he stock and sell the recommended brand of TBA. Through the constant reminder of the Texaco salesman, through demonstration projects and promotional materials, through all of the dealer's contacts with Texaco, he learns the lesson that Texaco wants him to purchase for his station the brand of TBA which pays Texaco 10% on every retail item the dealer buys. With the dealer's supply of gasoline, his lease on his station, and his Texaco identification subject to continuing review, we think it flies in the face of common sense to say, as Texaco asserts, that the dealer is 'perfectly free' to reject Texaco's chosen brand of TBA."

The Court of Appeals and plaintiff cited cases holding that actions such as Citgo's violate Section 1 of the Sherman Act and Section 3 of the Clayton Act. The Court cited *Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207, 1217 (9th Cir. 1977); *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832, 838 (4th Cir. 1969); *Richfield Oil Corporation* v. *Karseal Corp.*, 271 F.2d 709, 712 (9th Cir. 1959).

Osborn deals with the same kinds of conduct in the same industry as those which are the subject of this suit, and there the Court in a unanimous opinion by Chief Judge Sobeloff held that the record showed an unreasonable restraint of trade between Sinclair and its dealers consisting of tying the sale of TBA to the lease of service stations and the sale of gasoline. Plaintiff's Reply Brief also cited *United States* v. *Sun Oil Company*, 176 F. Supp. 715 (E.D. Pa. 1959), holding that the similar TBA practices of Sun Oil violated Section 1 of the Sherman Act and Section 3 of the Clayton Act.

Belliston v. *Texaco*, 455 F.2d 175 (10 Cir. 1972), *cert. denied*, 408 U.S. 928 (1972), relied upon by Citgo, actually

constitutes an opinion that threats such as those proven in the instant case would be sufficient to show coercion. In explaining why this Court found coercion to exist in *Atlantic Refining Co.* v. *FTC,* 381 U.S. 357 (1965), the Tenth Circuit said that in *Atlantic* "Some dealers were **threatened** with the loss of their leases if they did not comply." (455 F.2d 183; emphasis supplied.)

Citgo's argument appears to be founded on the incredible theory that a finding that conduct constitutes an unfair method of competition under the FTC Act operates as a shield against private antitrust claims under the Sherman and Clayton Acts. Certainly nothing in any of the cases relied upon by the Court of Appeals or cited by Citgo suggests that particular conduct may not be both an unfair method of competition and a violation of the Sherman and Clayton Acts.

IV.

CITGO'S PETITION SHOULD BE DENIED BECAUSE IT WRONGFULLY SEEKS TO HAVE THIS COURT REVIEW THE SUFFICIENCY OF PLAINTIFF'S EVIDENCE AMPLY ESTABLISHING THE ELEMENTS OF ILLEGAL TIE-IN SALES.

Citgo also seeks to have this Court review the sufficiency of plaintiff's evidence by contending that no *per se* tying case was proven (1) in that Citgo did not have sufficient economic power in its tied products (the leases of Citgo stations with identifying signs, pumps, and service equipment, the sale of Citgo-branded oil and gas to the dealers as recognized Citgo dealers, the Citgo credit cards, and the Citgo trademark); and (2) in that there was not a "not insubstantial" amount of commerce in the tied product, TBA, despite the fact that plaintiff's sales of TBA to these Citgo stations diminished from $232,022 in

1970 to $22,300 in 1975, and $631,537.30 of TBA sales to the same Citgo stations were transferred to Berry during the same period. (A116) Both District Judge Grady and District Judge McGarr found against defendant on these points. (A27; R.83.)

This Court has repeatedly stated that "we do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). Citgo's petition should therefore be denied.

Furthermore, the entire thrust of Citgo's petition is directed to its contention that plaintiff did not produce sufficient evidence to establish a *per se* tie-in offense, thereby ignoring the Court's reference to "boycotts" as well as tie-ins, meaning that Citgo's same actions in concert with its coerced dealers may be decided by a jury to constitute a group boycott, as plaintiff contends, as well as illegal tie-ins.

The Court in its unanimous Order, and District Judge Grady, found that plaintiff advanced sufficient evidence of coercion to entitle it to a jury trial on its various antitrust charges, and defendant in its petition has advanced no new grounds for overturning these decisions.

Even if the present decision was in conflict with decisions of this Court or of other federal courts of appeal concerning tie-in sales, which it is not, as discussed below, review should not be granted because this case could be decided on grounds other than tie-in sales, such as group boycott, exclusive dealing, and conspiracy to restrain trade. See Stern and Gressman, *Supreme Court Practice*, Fifth Edition (1978), pp. 271, 272.

Citgo's attempt to define the elements of tying shows that it is relying on the obsolete tests of the 1953 *Times-*

Picayune case (345 U.S. 594). Citgo ignores the evolution of the law in the next 25 years, part of which is aptly summarized in *Antitrust Developments* 1955-1968 (ABA), pp. 106-108:

> "The major developments since *Times-Picayune* have been the virtual elimination of monopoly power in the tying product as a relevant factor and the coalescence of the standards into a rule of near *per se* proportions under both statutes. . . .
>
> "These developments began with *Northern Pacific Railway Co.* v. *United States* [356 U.S. 1 (1958)], which substantially revised the *Times-Picayune* test. The Supreme Court in that case substituted the concept of 'sufficient economic power' to produce 'an appreciable restraint,' for the requirement of a monopolistic position in the market for the tying item. It thereby not only reduced the degree of requisite market power, but also seemingly eliminated the necessity for a full-fledged inquiry into market effects.
>
> ". . . .
>
> "Any doubt as to the implications of *Northern Pacific* was dispelled a few years later in *United States* v. *Loew's, Inc.*, [371 U.S. 38 (1962)]. . . .
>
> "The *Northern Pacific* standard was met, the Supreme Court ruled, because the films in question [which were sold in a block] were copyrighted and the 'requisite economic power is presumed when the tying product is patented or copyrighted. . . .' But the Court did not rest on that conclusion. It added that 'even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes'. And, in an illuminating footnote, the Court went on to say:
>
> > 'Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a demonstration of market power in the sense of a § 2 of the Sherman Act, it should seldom be necessary

> in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the Seller's percentage share in that market.'
>
> ". . . .
>
> "To restate the presently applicable rule, a tying arrangement violates the Sherman Act (and a *fortiori* the Clayton Act) when the tying product, by virtue of either uniqueness or consumer appeal, gives the defendant sufficient economic power in the tying product to accomplish the tie-in and a not insubstantial amount of commerce in the tied product is affected. With respect to the latter requirement, it is far from onerous, as evidence by the fact that as little as $60,800 was found 'not insubstantial' in *Loew's.*"*

In *Fortner Enterprises* v. *U.S. Steel Corp.*, 394 U.S. 495, 502-503 (1969) this Court reaffirmed that "Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market."**

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* See also *Moore* v. *Jas. H. Matthews & Co.*, 550 F. 2d 1207, 1216 (9 Cir. 1977) citing *Loew's*, and the decision in *Detroit City Dairy* v. *Kowalski Sausage Co.*, 393 F. Supp. 453 (E.D. Mich. 1975) that $86,376.72 "is not an insubstantial amount."

** *Phillips* v. *Crown Central Petroleum Corp.*, 602 F. 2d 616, 628 (4 Cir. 1979), relied on by Citgo, is not to the contrary; that case involved only contracts between a franchisor and a franchisee, not involving third persons, and the Fourth Circuit distinguished "remarks in past tying cases [such as *FTC* v. *Texaco*, 393 U.S. 223] that the oil company's plenary power over its dealers is inherent in the structure and economics of the petroleum distribution system" on the following reasoning:

Therefore, with Citgo as the dominant economic oil company holding its "independent" dealers in its control with its station leases and sales of Citgo-branded gas and oils, and plaintiff having in 1970 sold $232,022 of TBA to the Citgo dealers, the economic power and "not insubstantial amount" of commerce both exist, and a tie-in which is illegal *per se* under both the Sherman and Clayton Acts has been shown to exist.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT W. BERGSTROM
BERGSTROM, DAVIS & TEEPLE
39 South LaSalle Street
Suite 800
Chicago, Illinois 60603
(312) 641-1420
Attorneys for Respondents.

** (Continued)

> "But that comment, and others like it, were made in cases where the tied product was not purchased directly from the seller of the tying product. Slightly different considerations apply when the tying agreement is part of an otherwise valid franchise arrangement, since the very essence of a franchise is the purchase of several related products in a single competitively attractive package."

(See the distinction of "single product" cases in *Moore* v. *Jas. H. Matthews & Co.*, 550 F. 2d 1207, 1214-16 (9 Cir. 1977).) The franchisor-franchisee distinction holds for *Yentsch* v. *Texaco*, 630 F. 2d 46 (2nd Cir. 1980).